No. 94-1837 (24)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

BARNETT BANK OF MARION COUNTY, N.A.,

Petitioner,

v.

BILL NELSON, INSURANCE COMMISSIONER OF THE STATE OF FLORIDA, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

NATHAN LEWIN
(Counsel of Record)
SCOTT L. NELSON
J. BRADLEY BENNETT
JAMES R. HEAVNER, JR.
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

RICHARD E. SWARTLEY
General Counsel
BARNETT BANKS, INC.
50 N. Laura Street
Jacksonville, FL 32202
(904) 791-7505

Attorneys for Petitioner

DAVID J. BUSCH
(Counsel of Record)
DANIEL Y. SUMNER
General Counsel
FLORIDA STATE DEPARTMENT OF INSURANCE
200 E. Gaines Street
Tallahassee, FL 32399-0307
(904) 413-4146

Attorneys for Respondents Bill Nelson and the Florida Department of Insurance

ANN M. KAPPLER
(Counsel of Record)
SCOTT A. SINDER
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Attorneys for Respondents Insurance Agents

PETITION FOR CERTIORARI FILED MAY 8, 1995
CERTIORARI GRANTED SEPTEMBER 27, 1995

1 pp

TABLE OF CONTENTS

DOCKET ENTRIES

DATE	PROCEEDINGS
10/18/93	Complaint Filed.
10/25/93	Motion by Barnett Bank of Marion County for Temporary Restraining Order or Preliminary Injunction; Memorandum in Support of Motion for Immediate Injunctive Relief.
10/26/93	Order Denying Immediate Injunctive Relief; Order Granting Hearing on Motion for Temporary Restraining Order.
10/27/93	Emergency Motion for Intervention by Florida Association of Life Underwriters, Professional Insurance Agents of Florida, Inc. And Florida Association of Insurance Agents; Memorandum of Points and Authorities in Support Thereof; Proposed Answer And Affirmative Defenses of Intervenor-Defendants; Order Granting Motion to Intervene.
10/27/93	Memorandum of Defendants The Honorable Tom Gallagher And Florida Department of Insurance in Opposition to Motion for Temporary Restraining Order.
10/27/93	Hearing on Motion for Temporary Restraining Order.

DATE	PROCEEDINGS
10/28/93	Order Denying Motion for Temporary Restraining Order.
11/05/93	Trial Memorandum And Memorandum in Support of Motion for Preliminary Injunction by Barnett Bank of Marion County.
11/08/93	Defendants' Answer to Complaint for Declaratory Relief.
11/10/93	Answer of Barnett Bank of Marion County to Defendants' Counterclaims.
11/10/93	Notice of Amended Answer; Amended Answer, Affirmative Defenses And Counterclaims of Intervenor-Defendants; Memorandum of Points And Authorities in Support Thereof.
11/12/93	Memorandum of The Honorable Tom Gallagher And Florida Department of Insurance in Opposition to Plaintiff's Request for Injunction.
11/12/93	Intervenor-Defendants' Trial Memorandum in Opposition to Trial Memorandum of Barnett Bank of Marion County.

DATE	PROCEEDINGS
11/15/93	Response of Barnett Bank of Marion County to Motion to Amend Answer to Include Omitted Counterclaims.
11/17/93	Reply of Barnett Bank of Marion County to Trial Memoranda of Defendants And Intervenor-Defendants.
11/17/93	Order Granting Intervenor-Defendants' Motion to Amend Answer to Include Omitted Counterclaims.
11/17/93	Answer of Barnett Bank of Marion County to Additional Counterclaims.
11/19/93	Hearing on Motion for Preliminary Injunction And Trial on The Merits.
11/24/93	Intervenor-Defendants' Proposed Findings of Fact And Conclusions of Law.
11/24/93	Proposed Final Order by Barnett Bank of Marion County.
11/24/93	Proposed Final Judgment by The Honorable Tom Gallagher And Florida Department of Insurance.

DATE	PROCEEDINGS
12/03/93	Opinion And Order by The District Court; Judgment Entered for Defendants And Intervenor-Defendants.
12/06/93	Notice of Appeal by Barnett Bank of Marion County.
12/21/93	Notice of Cross Appeal by The Honorable Tom Gallagher And Florida Department of Insurance.
01/03/94	Notice of Cross Appeal by Intervenor-Defendants.
02/22/94	Brief for Appellant Barnett Bank of Marion County.
02/22/94	Amicus Brief for The Comptroller of The Currency of The United States.
02/22/94	Amicus Brief for Florida Bankers Association.
02/22/94	Amicus Brief for American Bankers Association, Association of Banks in Insurance, Bankers Roundtable, Consumer Bankers Association, And Louisiana Bankers Association.

DATE	PROCEEDINGS
03/28/94	Brief for Appellees/Cross Appellants The Honorable Tom Gallagher And Florida Department of Insurance.
04/01/94	Brief for Appellees/Cross Appellants Florida Association of Life Underwriters, Professional Insurance Agents of Florida, Inc. And Florida Association of Insurance Agents.
04/25/94	Reply Brief And Brief for Cross Appellee Barnett Bank of Marion County.
05/06/94	Reply Brief for Cross Appellants The Honorable Tom Gallagher And Florida Department of Insurance.
05/06/94	Reply Brief for Cross Appellants Florida Association of Life Underwriters, Professional Insurance Agents of Florida, Inc. And Florida Association of Insurance Agents.
01/30/95	Judgment Affirmed by Published Opinion of The Court of Appeals.
02/21/95	Petition for Rehearing by Barnett Bank of Marion County.
03/28/95	Order Denying Rehearing.

TABLE OF AUTHORITIES - CONTINUED

CONSTITUTIONAL PROVISIONS:

STATUTES AND REGULATIONS:

TABLE OF AUTHORITIES - CONTINUED

LEGISLATIVE MATERIALS:

TABLE OF AUTHORITIES - CONTINUED

Page(s)

OTHER AUTHORITIES:

No. 94-1837

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

BARNETT BANK OF MARION COUNTY, N.A.,

Petitioner,

v.

BILL NELSON, INSURANCE COMMISSIONER OF THE STATE OF FLORIDA, FLORIDA DEPARTMENT OF INSURANCE, FLORIDA ASSOCIATION OF LIFE UNDERWRITERS, PROFESSIONAL INSURANCE AGENTS OF FLORIDA, INC., and FLORIDA ASSOCIATION OF INSURANCE AGENTS,

Respondents.

**On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit**

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A, 1a-16a) is reported at 43 F.3d 631 (11th Cir. 1995). The opinion of the United States District Court for the Middle

District of Florida (Pet. App. B, 17a-36a) is reported at 839 F. Supp. 835 (M.D. Fla. 1993).

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was issued on January 30, 1995. A timely petition for rehearing and suggestion for rehearing en banc was denied on March 28, 1995 (Pet. App. C, 37a-38a). The petition for a writ of certiorari was filed on May 8, 1995. This Court granted certiorari on September 27, 1995. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this case are the Supremacy Clause of the United States Constitution (art. VI, cl. 2); the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15, 59 Stat. 34 (1945); Florida Statutes Annotated § 626.988; and 12 U.S.C. § 92, 39 Stat. 753 (1916). The relevant portions of these provisions are reproduced at Appendix A to this brief, pp. 1a-4a, *infra*.

STATEMENT

1. <u>In 1916, Congress Authorizes Certain National Banks To Sell Insurance</u>.

Congress laid the foundation for the current system of national banks in 1863 by enacting the National Currency Act, 12 Stat. 665 (1863), renamed the National Bank Act, 13 Stat. 99 (1864), the following year. In the National Bank

Act, Congress "set up a system of national banks as federal instrumentalities to perform various functions such as providing circulating medium and government credit, as well as financing commerce and acting as private depositaries." *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 375 (1954). Because the functions of national banks, "especially as a source for federal credit, depend upon their success in attracting private deposits," the "Federal Government has frequently expanded their functions and authority," so "[t]hat these federal institutions may be at no disadvantage in competition with state-created institutions." *Id.*

The basic powers of the national banks are defined by federal statutes. The most fundamental is 12 U.S.C. § 24, which grants the national banks not only certain specifically enumerated powers, but also, in language dating back to the first national bank legislation in 1863, "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24 (Seventh); *see also NationsBank of North Carolina v. Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 814 (1995).

In 1916, while legislation expanding the ability of national banks to engage in branch banking was pending before Congress, the Comptroller of the Currency — the federal official "charged with administration of the National Bank Act" (115 S. Ct. at 813) — sent a letter to the Chairman of the Senate Banking and Currency Committee proposing a provision authorizing national banks located in towns with populations not exceeding 3,000 to sell insurance and broker real estate loans. *See* 53 Cong. Rec. 11,001 (1916). The Comptroller stressed that small-town national banks faced competition from state-chartered banks and needed "additional sources of revenue" to "place them in a position where they could better compete with local State banks and trust companies." *Id.*

In response to the Comptroller's letter, an amendment was offered in the Senate to provide express authority for national banks in places with populations not exceeding 5,000 to broker real estate loans and to act as agents in the sale of insurance. The legislation as amended was enacted by both Houses of Congress and signed into law. The provision with respect to insurance agency, subsequently codified as 12 U.S.C. § 92 ("Section 92"), states unequivocally:

> In addition to the powers now vested by law in national banking associations . . ., any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, . . . may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State . . . .

Section 92's authorization of insurance agency activities by small-town national banks has remained unaltered for nearly 80 years. In *United States Nat'l Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 113 S. Ct. 2173 (1993), this Court rejected the argument that Congress had inadvertently repealed it in 1918. The Court noted that both the Comptroller and the courts had long taken the statute's existence as a given. *See id.* at 2176.

The Comptroller, meanwhile, has not, by regulation, limited the power of national banks to sell insurance, and has interpreted the statute expansively to authorize such sales. Since 1963, for example, the Comptroller has taken the position that the statute permits small-town branches of

national banks headquartered in larger communities to sell insurance. This position is embodied in a regulation promulgated by the Comptroller in 1971, which provides that Section 92 "is applicable to any office of a national bank when the office is located in a community having a population of less than 5,000 even though the principal office of such bank is located in a community whose population exceeds 5,000." 12 C.F.R. § 7.7100. The Comptroller has also consistently rejected the argument that Section 92 limits the geographic scope of insurance sales conducted from the offices of small-town national banks. *See* Comptroller Interpretive Letter No. 366 [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,536 (August 18, 1986); *NBD Bank, N.A. v. Bennett*, No. 95-1310, 1995 U.S. App. LEXIS 27835 (7th Cir. Oct. 4, 1995); *Independent Ins. Agents of America, Inc. v. Ludwig*, 997 F.2d 958 (D.C. Cir. 1993). The Seventh Circuit summarized the Comptroller's policy position in *NBD, supra*, 1995 U.S. App. LEXIS 27835 at *9:

> The Comptroller believes not only that sec. 92 permits small-town branches to sell insurance but also that these sales are desirable: they enhance banks' revenues, diversify their business without creating any threat to their solvency, and increase competition. Banks, buyers of insurance, and the federal deposit insurance fund all gain.

2. <u>In 1945, Congress Passes the McCarran-Ferguson Act To Confirm State Regulatory Authority</u>.

The McCarran-Ferguson Act (59 Stat. 34, codified at 15 U.S.C. §§ 1011-15) was passed nearly 30 years after Section 92. The impetus for the passage of the McCarran-

Ferguson Act was this Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), in which the Court, for the first time, held that the business of insurance constituted interstate commerce within the meaning of the Commerce Clause. Cooperative rate-making within the insurance industry was therefore held to be subject to the Sherman Antitrust Act.

The dissents in the *South-Eastern Underwriters* case pointed out that the decision created the very real possibility that state regulatory authority over the insurance industry would be invalidated. *See* 322 U.S. at 580-82 (Stone, C.J., dissenting); 322 U.S. at 590-93 (Jackson, J., dissenting). The dissenters did not question Congress' power to enact legislation relating to the insurance industry, but in view of longstanding precedent holding that the insurance industry was not a part of interstate commerce, they warned about the potential invalidation of state insurance legislation by implication.

The concerns of the dissenters were echoed by representatives of the insurance industry and by state insurance regulators, who pressed for legislation overturning the result in *South-Eastern Underwriters*. Senators McCarran and Ferguson responded by introducing the legislation subsequently enacted as the McCarran-Ferguson Act. The Act addressed the concerns of the critics of *South-Eastern Underwriters* in two major respects:

First, with respect to *South-Eastern Underwriters'* specific holding applying the federal antitrust laws to the insurance industry, the Act prescribed a moratorium until June 30, 1948, on the application of the Sherman, Clayton, Federal Trade Commission and Robinson-Patman Acts to the "business of insurance" (except with respect to acts of boycott, coercion, or intimidation). 15 U.S.C. § 1013. The

Act provided that the antitrust laws would thereafter be applicable to "the business of insurance to the extent that such business is not regulated by State law." 15 U.S.C. § 1012(b).

Second, with respect to the concerns voiced by the *South-Eastern Underwriters* dissenters and by state regulators that the decision might deprive States of the power to regulate insurance altogether, the Act recognized congressional authority to legislate regarding the business of insurance, but it rejected displacement of state law regulating the business of insurance where there was no federal legislation. The Act declared "that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that *silence* on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." 15 U.S.C. § 1011 (emphasis added). The Act further provided that "[t]he business of insurance . . . shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 15 U.S.C. § 1012(a). And in the provision most pertinent here, the Act prescribed that "[n]o act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b).

As a result, the McCarran-Ferguson Act shields a state law against federal pre-emption if two statutory conditions are satisfied. *First*, the state law in question must be a "law enacted . . . for the purpose of regulating the business of insurance." *Second*, the state law may not conflict with any act of Congress that "specifically relates to the business of insurance."

3. In 1974, Florida Prohibits Certain National Banks from Selling Insurance.

The state law with which this case is concerned is Fla. Stat. Ann. § 626.988. It was enacted in 1974, in response to requests by several Florida bank holding companies for approval by the Federal Reserve Board of applications to operate insurance agencies. The legislation originally introduced in the Florida legislature contained a preamble setting forth its rationale in a series of "whereas" clauses. *See* Committee Substitute for H.B. 3152, 3rd Fla. Leg., 2d Reg. Sess. (1974), reproduced as Appendix B to this brief, pp. 5a-10a, *infra* ("H.B. 3152"). The reasons stated in the preamble were that competition from banks might be disadvantageous to small insurance agencies; that banks might attempt to "tie" sales of insurance to other services sought by their customers (particularly the extension of credit); that banks, as depositories of the funds of others, should not be in competition with their depositors; and that permitting banks to engage in insurance sales activities could lead to "undue concentration of economic resources." The preamble did not mention the McCarran-Ferguson Act. It stated that the legislation was an exercise of legislative authority reserved to the states in the Bank Holding Company Act of 1956, 12 U.S.C. § 1846.

The preamble was deleted in an amendment offered just before final passage of the legislation. *See Journal of the Florida House of Representatives*, 3rd Fla. Leg., 2d Reg. Sess. 551 (May 2, 1974). There is no indication in the legislative history that the amendment reflected a disavowal of the reasons stated in the preamble. Nor is there in the legislative history any statement of purpose of the legislation other than the preamble.

Section 626.988 provides generally that insurance agents may not engage in "insurance agency activities" (*i.e.*, the "solicitation, negotiation, selling, effectuating, or servicing of any policy or contract of insurance other than credit life insurance and credit disability insurance") if they are associated with, under contract with, retained by, owned or controlled by, or employed by any "financial institution." The term "financial institution" is defined to include banks, bank holding companies, savings and loans, and savings and loan holding companies. Excepted from the statute's definition of "financial institutions" are banks located in cities with populations of less than 5,000 that are not owned by or affiliated with a bank holding company. The statute thus permits *some* national banks (those not owned by a holding company) to engage in the insurance sales activities authorized by 12 U.S.C. § 92. But the statute forbids any national bank affiliated with a bank holding company from exercising the authority granted by Section 92 to sell insurance from a small-town branch.

Before this case arose, Section 626.988 was challenged in the Florida state courts on substantive due process and equal protection grounds in *Glendale Fed. Sav. & Loan Ass'n v. Florida Dep't of Ins.*, 587 So. 2d 534 (Fla. App. 1991), *review denied*, 599 So. 2d 656 (Fla. 1992). In that case, the Florida District Court of Appeal upheld the statute as rationally based, on the ground that a rational legislature "could" have decided that permitting banks to sell insurance would help prevent "coercion, unfair trade practices, and undue concentration of resources." *Id.* at 541.

4. In 1993, Barnett Bank Buys an Insurance Agency.

Petitioner Barnett Bank of Marion County ("Barnett Bank" or "the Bank") is a national bank doing business in

the State of Florida. Barnett Bank is a subsidiary of a bank holding company, Barnett Banks, Inc. The Bank has a branch in Belleview, Florida, a town with a population of 2,666.

In 1993, Barnett Bank purchased an insurance agency that had been owned by Ms. Linda Clifford, a licensed Florida insurance agent. Ms. Clifford became an employee of Barnett Bank, with an office located in Belleview. Four days later, the Florida Department of Insurance issued an order pursuant to Section 626.988 directing Ms. Clifford and her associates to cease all their insurance agency activities other than the sale of credit life and disability insurance (which the Florida statute permits).

5. Barnett Bank Litigates and Loses.

Simultaneously with its acquisition of Ms. Clifford's agency, Barnett Bank filed this action against the Insurance Commissioner of the State of Florida and the Florida Department of Insurance in the United States District Court for the Middle District of Florida, seeking a declaratory judgment that 12 U.S.C. § 92 pre-empted Section 626.988, which otherwise would prohibit the Bank or any of its employees from acting as an insurance agent. When the Florida Department of Insurance issued its order requiring the Bank's insurance agency to cease operations, the Bank moved for a temporary restraining order and preliminary injunction. The District Court denied the TRO. It consolidated the motion for preliminary injunction with a trial on the merits of the Bank's claims for permanent declaratory and injunctive relief, as well as with the defendants' counterclaims for a declaratory judgment that the Florida statute was not pre-empted. Associations of Florida insurance agents intervened before trial as defendants and counter-claimants.

After trial, the district court denied the motion for a preliminary injunction and issued a final judgment denying Barnett Bank's requests for permanent injunctive and declaratory relief. The court acknowledged that the Florida statute prohibiting the Bank from operating an insurance agency directly conflicted with 12 U.S.C. § 92. Nonetheless, the court held that the Florida law was saved from pre-emption by the McCarran-Ferguson Act. According to the court, the Florida statute prohibiting banks from acting as insurance agents was a law regulating the "business of insurance," while the federal statute permitting banks to act as insurance agents was not a law "specifically relat[ing] to the business of insurance." 839 F. Supp. at 842-43, Pet. App. 32a-35a.

The Court of Appeals for the Eleventh Circuit affirmed. Ignoring the contrary decision of the Sixth Circuit in *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994), Pet. App. D, 39a-64a, the Eleventh Circuit accepted both parts of the district court's analysis of the McCarran-Ferguson Act. Purporting to apply a test derived from this Court's decision in *United States Dep't of Treasury v. Fabe*, 113 S. Ct. 2202 (1993), the court of appeals concluded that the Florida statute "regulat[es] the business of insurance" within the meaning of the McCarran-Ferguson Act because the Florida law "was enacted to regulate the relationship between insurers and *potential* policyholders or, more broadly, 'the insurance-purchasing public at large.'" 43 F.3d at 635, Pet. App. 11a. The Eleventh Circuit also held that 12 U.S.C. § 92, the federal statute permitting small-town national bank branches to operate insurance agencies, does not "specifically relat[e] to the business of insurance." The court reasoned that in permitting such banks to sell insurance, "Congress was concerned with banking, not insurance." 43 F.3d at 637, Pet. App. 15a.

SUMMARY OF ARGUMENT

This case will decide whether the power to sell insurance explicitly and deliberately granted to certain national banks by Congress in 1916 is overridden by a state law enacted more than half a century after the empowering federal statute. The federal policy favoring the exercise of this power by the specified national banks has been consistently endorsed since the initial enactment by Comptrollers of the Currency, who are entrusted to implement national policy on this subject.

The claimed justification for overriding the 1916 federal law is language in the McCarran-Ferguson Act of 1945, 15 U.S.C. §§ 1011-1015, that shields state laws regulating the business of insurance from federal pre-emption, except where such laws conflict with a federal statute that "specifically relates to the business of insurance." The state law at issue in this case is Fla. Stat. Ann. § 626.988, which Florida enacted in 1974 to prohibit banks from selling insurance in Florida. The McCarran-Ferguson Act does not, however, validate the Florida law.

1. The Florida law is in direct conflict with 12 U.S.C. § 92, which authorizes the sale of insurance by national banks in towns whose population does not exceed 5,000. Decisions of this Court have firmly established that the Supremacy Clause of the United States Constitution invalidates any state law that prohibits conduct explicitly authorized by a federal statute.

2. The Florida law is not rescued by Section 2(b) of the McCarran-Ferguson Act because its stated purpose — expressed in a preamble to the bill when it was introduced — was to prevent banks from competing with insurance agencies because banks were thought to have excessive

economic power. The Florida law was enacted in the exercise of the state legislature's perceived power to regulate banks, not to regulate "the business of insurance."

In addition, the Florida law is a bare pin-pointed prohibition, not part of a scheme of regulation. And the language of the McCarran-Ferguson Act, as well as its legislative history, establishes that the federal law contemplated state regulation of insurance, not a prohibition against sale of insurance by otherwise qualified agents.

Finally, the Florida law does not regulate the aspects of insurance that deal with policyholders and with the enforcement of insurance contracts. This Court's decisions have articulated the guiding principle that a law "regulating the business of insurance" must be one that concerns the relationship between the insurer and the insured, and the details and enforcement of an insurance contract. The Florida law does not deal with, or directly affect, those subjects.

3. Alternatively, the Florida law cannot be applied because it conflicts with Section 92, which is a law that "relates to the business of insurance." The word "relates" — which is the critical term in the second prong of the test prescribed by Section 2(b) of the McCarran-Ferguson Act — is obviously broader than the term "regulating," which controls the first prong of the test. If the Florida law can be deemed to "regulate" the business of insurance, it is inconceivable that Section 92 would not be deemed to "relate" to insurance.

The court of appeals rejected this position on wholly untenable grounds. It read into Section 2(b) of the McCarran-Ferguson Act a requirement that the federal law *specifically* repudiate the state law. This was proposed in an

earlier draft of the McCarran-Ferguson Act that was rejected by Congress. The court of appeals' other reason — *i.e.*, that Congress could not have intended in 1916 to "regulate" insurance — is wholly beside the point. Congress' 1916 enactment "related" to insurance even though its legislative power was exercised as a necessary and proper outgrowth of its power to create national banks.

ARGUMENT

I.

SECTION 626.988 CONFLICTS WITH SECTION 92

Section 92 expressly and specifically authorizes national banks located in towns with populations not exceeding 5,000 to sell insurance. The terms of the federal statute are unambiguous. Its purpose was set forth in the letter written in 1916 to Congress from the Comptroller of the Currency. It was designed to provide additional sources of revenue for national banks located in small towns.

If the terms of the statute and its legislative history left any room for doubt, the Comptroller of the Currency, to whose interpretation of the National Bank Act this Court has consistently deferred (*see NationsBank of North Carolina v. Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 813 (1995)), has consistently taken the position that Section 92 permits small-town national banks (and small-town national bank branches) to sell insurance. Today's Comptroller has reiterated the purpose of this authority — to enhance the revenues and financial stability of small-town national banks. The statute, its history, and its construction by Comptrollers since 1916 thus leave no doubt that the purpose and effect of the statute are, as the Seventh Circuit recently put it, to

"identif[y] a line of business in which national banks may engage." *NBD Bank, N.A. v. Bennett*, No. 95-1310, 1995 U.S. App. LEXIS 27835 (7th Cir. Oct. 4, 1995).

Section 626.988, by contrast, denies national banks — at least those affiliated with bank holding companies — the authority to do what Section 92 empowers them to do. Under the Supremacy Clause, such a direct clash between federal and state legislation can have but one result: the state statute is pre-empted. As this Court has repeatedly held, state laws are pre-empted when they conflict with federal law by "'stand[ing] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992) (opinion of O'Connor, J.) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Felder v. Casey*, 487 U.S. 131, 138 (1988); *Perez v. Campbell*, 402 U.S. 637, 649 (1971)).

It is clear that a state law that directly forbids a national bank to exercise a power expressly conferred by Congress conflicts with the federal statute. In *Franklin Nat'l Bank v. New York*, 347 U.S. 373 (1954), this Court held that a federal law expressly granting national banks authority to receive savings deposits pre-empted a state statute denying national banks the right to use the word "savings" in advertisements. The Court concluded that "the federal and state statutes are incompatible, and in such circumstances the policy of the State must yield." 347 U.S. at 374. The Court emphasized that the federal legislation was "declaratory of the right of a national bank to enter into or remain in that type of business." Because the Court found "no indication that Congress intended to make this phase of national banking subject to local restrictions," it concluded that there was "a clear conflict" between the state and federal

statutes and the state-law restrictions "must give way to the contrary federal policy." *Id.* at 377-79.

In *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141 (1982), the Court addressed a similar issue: whether a federal regulation permitting a federally chartered savings and loan to enforce a "due on sale" clause in a mortgage pre-empted state law prohibiting such clauses. Although the federal regulation simply *permitted* the use of such clauses and did not *require* it, the Court had no difficulty concluding that the state prohibition was in conflict with the federal regulation (458 U.S. at 155 (citations omitted)):

> The conflict does not evaporate because the Board's regulation simply permits, but does not compel, federal savings and loans to include due-on-sale clauses in their contracts and to enforce those provisions when the security property is transferred. . . . Although compliance with both [the federal and state law] may not be "a physical impossibility," the California courts have forbidden a federal savings and loan to enforce a due-on-sale clause solely "at its option" and have deprived the lender of the "flexibility" given it by [federal law].

The Court stressed that the state law forbade a "practice the [Federal Home Loan Bank] Board has approved and views as critical to 'the financial stability of the association.'" *Id.* at 156. The Court concluded, "By further limiting the availability of an option the Board considers essential to the economic soundness of the thrift industry, the State has created 'an obstacle to the accomplishment and execution of the full purposes and objectives' of [federal

law]." *Id.* at 156 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

By the same token, Section 626.988 limits the "availability of an option" — the power of a small-town national bank to sell insurance — that both Congress and Comptrollers of the Currency have long considered important to the well-being of small-town national banks. Under conventional pre-emption principles applied in *Franklin Nat'l Bank* and *De La Cuesta*, Section 626.988 should be pre-empted by the federal law.

The question posed by this case is whether these "ordinary pre-emption principles" must give way in this instance to a "special federal statute" — the McCarran-Ferguson Act. *See Garcia v. Island Program Designer, Inc.*, 4 F.3d 57, 58 (1st Cir. 1993) (Breyer, J.). That question depends, in turn, upon whether the Florida statute, Section 626.988, is a "law enacted . . . for the purpose of regulating the business of insurance" within the meaning of McCarran-Ferguson, and, if so, whether Section 92 nonetheless prevails over Section 626.988 because Section 92 "relates specifically to the business of insurance."

II.

SECTION 626.988 AFFECTS BANKS AND INSURANCE AGENTS BUT IT DOES NOT "REGULATE THE BUSINESS OF INSURANCE"

The Florida law we are challenging in this case can pass its first hurdle under the McCarran-Ferguson Act only if it is a "law enacted by [Florida] for the purpose of regulating the business of insurance." 12 U.S.C. § 1012(b).

We demonstrate below that Section 626.988 does not satisfy this language of the McCarran-Ferguson Act, particularly not in light of the Act's legislative history. We also demonstrate that Section 626.988 does not pass muster under the principles articulated in this Court's decisions construing Section 2(b) of the McCarran-Ferguson Act. Rather than affecting performance of an insurance contract or otherwise protecting or regulating the relationship between the insured and the insurer, the Florida law affects competition between banks and insurance agents and protects the interests of the agents.

A. Section 626.988 Does Not Satisfy Any of the Three Statutory Tests.

Section 2(b) shields against pre-emption only a state law that has been enacted

(1) "for the purpose"
(2) "of regulating"
(3) "the business of insurance."

Three questions must, therefore, be satisfactorily answered before the state law qualifies:

(1) *Why* was the law enacted? Was its purpose to regulate the business of insurance?

(2) *How* does the law operate? Is it a form of regulation?

(3) *What* is its subject? Does it deal with the business of insurance?

Section 626.988 fails all three tests. Its purpose is not the statutorily defined purpose. Its form is not the form of regulation. And its target is not the business of insurance.

(1) Why was the Florida law enacted?

Section 626.988 was enacted in 1974 to avoid the Federal Reserve Board's anticipated approval of applications submitted by several bank holding companies, including Barnett Banks of Florida, Inc., for permission to offer insurance to their Florida customers. *See Florida Ass'n of Ins. Agents, Inc. v. Board of Governors*, 591 F.2d 334, 336 (5th Cir. 1979). While the Federal Reserve Board was considering an administrative law judge's recommendation to approve the applications, identical bills were introduced in both chambers of the Florida legislature to preclude the banks from employing agents to sell most forms of insurance. *See* H.B. 3152, App. B, *infra*, 5a-7a; S.B. 0525.

The preamble to the bills that became Section 626.988 set forth the legislature's objectives: (1) to prevent the "demise of small insurance agencies" due to competition with banks; (2) to diminish the possibility that prospective borrowers would feel pressure to utilize other banking services, including insurance agency sales, in order to better their chances of obtaining funds; (3) to keep banks from "competing" with their depositors; and (4) to prevent "the undue concentration of economic resources," presumably by large bank holding companies. The first of these goals reflects simple economic protectionism, and a preference for the interests of independent insurance agents over those of banks — objectives that have nothing to do with the regulation of the business of insurance. The second and third are purely bank-oriented, pertaining to the relationship between borrowers, depositors, or the public at large and banks acting in their capacity as savings or lending

institutions. The fourth reflects a social policy having nothing at all to do with insurance, and everything to do with hostility toward large banking enterprises. *None* of the Florida legislature's objectives aims to protect insurance policyholders vis-a-vis insurers with respect to the underwriting, interpretation, reliability, enforcement, or performance of insurance contracts.

Indeed, the concerns of the Florida legislature as set out in the preamble to Section 626.988 almost precisely parallel the considerations that the Federal Reserve Board is required by statute and regulation to consider in ruling on a request by a bank holding company for approval to engage in insurance agency activities under 12 U.S.C. § 1843(j)(2)(A) and 12 C.F.R. § 225.24(a). Specifically, those provisions require the Board to consider whether bank holding company activities "can reasonably be expected to produce benefits to the public (such as greater convenience, increased competition, and gains in efficiency) that outweigh possible adverse effects (such as undue concentration of resources, decreased or unfair competition, conflicts of interest, and unsound banking practices)." *Id.* The striking convergence between these concerns of federal bank regulation and the ostensible interests served by Section 626.988 (as reflected in its preamble) makes clear that the essential aim of the statute was regulation of bank holding companies and other financial institutions, and not "regulating the business of insurance."

That the Florida legislation was enacted for the purpose of regulating banks, and not the insurance business, is confirmed by the statutory authority that Florida invoked. When enacting Section 626.988, the Florida legislature did not rely on the McCarran-Ferguson Act, as it had in 1947, when it passed legislation to control "unfair trade practices" in the insurance industry. *See* Fla. Stat. Ann. § 626.951.

Instead, the preamble to Section 626.988 invoked Section 7 of the Bank Holding Company Act of 1956, 12 U.S.C. § 1846, as authority to enact legislation "with respect to bank holding companies." H.B. 3152, App. B, *infra*, 7a. If Florida intended in 1974 to regulate the business of insurance, rather than the conduct of banks, that purpose was exceptionally well concealed.

The court of appeals mistakenly looked to the purpose behind Florida's enactment in 1947 of the law regulating "Unfair Insurance Trade Practices" rather than to the purpose of the 1974 law — which was inserted, in the codification of Florida's law, in the part dealing with insurance trade practices. The court of appeals cited a "reference in the Florida statute to McCarran-Ferguson" (43 F.3d at 636, Pet. App. 12a), but that is not a reference made in 1974. It is a reference made more than 25 years earlier in the enactment of a different Florida law.

The essential function of the 1974 enactment of Section 626.988 was to limit longstanding bank powers and otherwise to control the relationship between banks and their Florida customers. Laws enacted for this purpose do not escape pre-emption under the McCarran-Ferguson Act, because "[t]he McCarran-Ferguson Act was not directed at the activities of national banks." *First Nat'l Bank of Eastern Arkansas v. Taylor*, 907 F.2d 775, 779 (8th Cir.), *cert. denied*, 498 U.S. 972 (1990). As the Court of Appeals for the Sixth Circuit concluded in *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3145 (U.S. July 13, 1995) (No. 95-74), with respect to a Kentucky law that regulates banks in much the same manner as does Section 626.988 (44 F.3d at 392, Pet. App. 48a):

> [The law] helps to define the powers of Kentucky bank holding companies by excluding such companies from participation in the activities that constitute the "business of insurance." Excluding a person from participation in an activity, however, is different from regulating the manner in which the activity is conducted. The former is the regulation of the person; the latter is the regulation of the activity.

See also, United Services Auto. Ass'n v. Muir, 792 F.2d 356 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987). Because the purpose of the Kentucky statute was to restrain banks, and not to regulate the manner in which the "business of insurance" is conducted, the Sixth Circuit correctly held that the McCarran-Ferguson Act did not immunize the Kentucky law from pre-emption by Section 92. The same principle applies to Florida's law.

(2) How does the Florida law operate?

Section 626.988 has one intended effect — it excludes certain banks from the business of selling insurance in Florida. It does not, in any manner, regulate the integrity or efficiency of the insurance business within the State. It is not, therefore, an act *regulating* the business of insurance.

The McCarran-Ferguson Act was adopted to preserve the regulatory systems that various States had enacted and adopted with respect to the "business of insurance." This Court recently reaffirmed in *United States Dep't of Treasury v. Fabe*, 113 S. Ct. 2202, 2207 (1993), an observation first made in *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429 (1946), with regard to the reason why the McCarran-Ferguson Act was adopted: "Obviously Congress' purpose

was broadly to give support to the *existing and future state systems* for regulating and taxing the business of insurance" (emphasis added).

The legislative history of the Act — which we describe more fully at pp. 30-34, *infra* — clearly demonstrates that Section 2(b) was not designed to authorize isolated, sporadic and pin-pointed forays by state legislatures into areas that could affect the insurance business. Congress was seeking to shield legitimate state regulatory systems, not random prohibitory legislation.

That is why Section 2(a) of the McCarran-Ferguson Act speaks of subjecting the "business of insurance" to "the laws of the several States which relate to *the regulation or taxation of* such business" (emphasis added). The words "regulation or taxation" are otherwise entirely superfluous. If Congress had intended to protect *every* state law affecting insurance from pre-emption regardless of whether it was truly a form of "regulation," Section 2(a) could simply have read: "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to such business." And Section 2(b) could also, for the same reason, have been streamlined to omit the term "regulating" and the statutory reference to "a fee or tax." It could simply have preserved from pre-emption "any state law affecting the business of insurance."

To read Section 2(b) as applying to any state law regardless of whether it is truly regulatory "would be to read words out of the statute" — a form of statutory interpretation that this Court "refuse[d] to do" in *Fabe*, *supra*, 113 S. Ct. at 2209-10, and that it should similarly refuse to do in this case.

Another indication that a state law must be scrutinized under the McCarran-Ferguson Act to determine whether it is a *bona fide* form of "regulation" is the Act's repeated dual reference to both regulation and taxation. These appear as twin components of Sections 1 and 2. Section 1 declares that "regulation and taxation by the several States" is in the public interest, and that Congress' silence is not to be read as a barrier "to the regulation or taxation" of the insurance business. Section 2(a) also subjects the insurance business to state laws "which relate to the regulation or taxation of such business." And Section 2(b) provides, in the disjunctive, that a state law is valid if its purpose is "regulating" or if it "imposes a fee or tax" upon the insurance business.

Not every monetary exaction can qualify, however, as "taxation." A confiscatory levy — such as, for example, a hypothetical ten-thousand-dollar fee for every insurance contract written by any insurance agent employed by or associated with a bank — would obviously not qualify as "taxation" or as "a fee or tax." *Cf. Child Labor Tax Case*, 259 U.S. 20, 38 (1922); *Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937, 1946 (1994). Such a state law imposing an exaction masquerading as a tax would plainly be distinguishable from the type of conventional state taxation of the business of insurance upheld in *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946), which held that a South Carolina statute imposing a three percent gross receipts tax on premiums received by foreign insurers in the state constituted a legitimate tax on the business of insurance.

By the same token, not every state law that restricts or prohibits conduct by insurance agents is a law "regulating" the insurance business within the meaning of Section 2(b). The Florida law on which this case focuses

fails in this respect because, rather than "regulating" insurance, it simply excludes certain individuals — for reasons that have nothing to do with their competence, integrity, or ability to write insurance contracts — from the business of selling insurance. Ms. Linda Clifford, who had owned her insurance agency in Belleview, Florida, before she sold it to Barnett Bank, was as personally qualified to sell insurance after she became a Barnett Bank employee as she had been previously. Yet, under the guise of "regulating the business of insurance," the state authorities directed her to cease her sales because of her association with the bank. This, we submit, is not part of a system of "regulation" contemplated by Section 2(b) or by the draftsmen of the McCarran-Ferguson Act.

(3) What is the subject of the Florida Law?

Section 626.988 does not operate to adjust, manage or control the business of insurance in any manner whatsoever. It does not manage the spreading or underwriting of risks or govern the interpretation, reliability or enforcement of any contract of insurance. The Florida law imposes no standards of performance pertaining to insurance companies or their brokers, solicitors and agents, and it provides no tangible benefits to policyholders with respect to the performance or enforcement of the insurance contract.

Nor was the statute intended to affect the performance or enforcement of any insurance contract. In enacting Section 626.988, the Florida legislature expressed no concern about the quality or reliability of any insurance policy that banks might broker, and it made no mention of any potential impact on the stability or solvency of insurance companies. Instead, the primary justification identified in support of the law was the desire to prevent "the demise of

small insurance agencies" that might result from competition with banks. H.B. 3152, App. B, *infra*, 6a. This concern may implicate the business of insurance agents, but it does not reflect any intent to protect policyholders, or otherwise to regulate the "business of insurance."

Notwithstanding the actual and intended effects of the Florida statute, the district court construed Section 626.988 to regulate the business of insurance because the statute "appear[ed] to define or regulate a relationship between insurer and *potential* policyholder, that is, 'the insurance-purchasing public at large.'" 839 F. Supp. at 840, Pet. App. 28a. The court of appeals affirmed that conclusion, holding that Section 626.988 "was enacted to regulate the relationship between insurers and *potential* policyholders." 43 F.3d at 635, Pet. App. 11a. In addition, relying on trial testimony by an official of the Florida Department of Insurance, the court held that the Florida statute "protect[ed] policyholders by regulating the financial stability of insurance companies." 43 F.3d at 636, Pet. App. 12a. These asserted bases provide no support for the legal conclusion that Section 626.988 regulates the business of insurance.

A regulation aimed at protecting "potential policyholders" from "overreaching by banks," even if the concern about overreaching is grounded in reality, is not one that regulates the "business of insurance." The "overreaching" that Florida claims to be concerned about is the possibility of "tying" insurance sales to other bank services (in particular, extension of credit), such that bank customers will feel pressured to purchase insurance in order to avail themselves of the other benefits of their relationship

with the bank.[1] It is evident, however, that this supposed concern is not about the relationship of policyholder and insurer pursuant to a contract of insurance. Nor does it relate to the underwriting, performance or enforcement of the contract of insurance. Rather, it centers directly upon the relationship of banks, acting as savings or lending institutions, with their customers. *See* H.B. 3152, App. B, *infra*, 5a-7a; *see also Glendale Fed. Sav. & Loan Ass'n v. Florida Dep't. of Ins.*, 587 So.2d 534 (Fla. App. 1991).

In other words, the conduct being regulated by Florida does not relate to banks as "insurers" or "agents for insurers," but as financial institutions whose methods of attracting depositors, offering credit, and competing with other providers of financial services are an integral part of the business of banking, and not the "business of insurance." *Cf. FTC v. Dixie Fin. Co., Inc.*, 695 F.2d 926, 931 (5th Cir.) (holding that regulations aimed at preventing tying of insurance sales to extensions of credit do not regulate the business of insurance), *cert. denied*, 461 U.S. 928 (1983). That this relationship is fundamentally a concern of *banking* regulation, and is not an integral part of the "business of insurance," is confirmed by the fact that comprehensive federal banking regulations are already in place to prevent such tying practices. *See* 12 U.S.C. §§ 1971-78; *see also* Fla. Stat. Ann. § 626.9551.

As for the supposed relationship between the prevention of bank sales of insurance and the solvency of insurers, it rests on the exceedingly dubious proposition that

[1] There is no empirical evidence in the record to indicate that such practices, which are illegal under federal banking regulations, would occur to any significant degree if national banks affiliated with bank holding companies were permitted to sell insurance in small towns in Florida.

banks are more likely than other insurance agents to induce insurers to use unsound underwriting practices in issuing policies. There is no reason to believe this is true.[2] More importantly, however, there is no reason to believe that protection of insurance companies from this supposed danger is one of the "purposes" of Section 626.988. The preamble to the Florida legislation contains no mention of this concern, nor is it addressed in *Glendale*, 587 So. 2d 534, in which a Florida appellate court considered the purposes of the statute in upholding it against equal protection and due process challenges.

The *only* support for the notion that concerns for insurer solvency underlie Section 626.988 is the trial testimony of the Florida Insurance Department's Director of

---

[2] The testimony offered by respondents below about how Florida law presently operates to protect "the solvency of the insurance industry" (43 F.3d at 636, Pet. App. 12a) did not explain how Section 626.988 addressed this concern, but simply described *other* Florida statutes that address it. In 1983, Florida enacted a law that limits the control wielded by "third party administrators." *See* Fla. Stat. Ann. §§ 626.888-.894. In 1984, a similar law was passed with respect to "managing general agents." *See* Fla. Stat. Ann. §§ 626.7451-.7454. In 1992, Florida passed another law to control producers of insurance premiums in an amount greater than 5% of the admitted assets of an insurer. *See* Fla. Stat. Ann. § 626.7491. There is no dispute that these laws of general application were intended to protect the solvency of insurance companies by limiting the opportunity for powerful third parties to influence underwriting decisions. The testimony about the effect of Section 626.988, however, was wholly based on the erroneous assumption that Section 626.988 "addresses the same dangers that the legislature has addressed" in these statutes. *See* Tr. at 69. The testimony offered no support for that contention. Indeed, it is difficult to imagine how Section 626.988 could protect the solvency of insurance companies in ways that other applicable laws fail to do.

Legal Services. Such *post hoc* opinion testimony, however, has no place in the determination of the statute's "purpose" in addressing the pre-emption issue under the McCarran-Ferguson Act. *See Pacific Gas & Elec. Co. v. Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 216 (1983) (holding that courts should not look behind avowed purpose of legislature in addressing a pre-emption question turning on statutory purpose). Even if the Director had been personally involved in the passage of Section 626.988, his opinion about the purpose of the statute would be just that — an irrelevant opinion. *See Russello v. United States*, 464 U.S. 16, 26 (1983); *United States v. O'Brien*, 391 U.S. 367, 383 (1968).

Nor can Section 626.988 be deemed a law regulating the "business of insurance" on the ground that insurance sales by agents affiliated with banks could result in poor underwriting decisions which, in turn, could lead to the insolvency of insurance companies. Regulation of the relationship between an insurance company and persons other than policyholders (in this case, banks) does not constitute regulation of "the business of insurance" simply because such regulation may indirectly enhance the solvency or reliability of the insurance company. Precisely the same argument was rejected by this Court in *United States Dep't of Treasury v. Fabe*, 113 S. Ct. 2202 (1993), and in *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979). The Court explained in *Fabe* that the argument went "too far" because any regulation of the relationship of an insurance company with some other entity "ultimately may redound to the benefit of policyholders by enhancing the reliability of the insurance company." 113 S.Ct. at 2212. And in *Royal Drug* the Court held that improving the "reliability" of an insurer was not regulation of the "business of insurance" but of the "business of insurance companies." 440 U.S. at 217.

B. The Legislative History of the McCarran-Ferguson Act Supports the Conclusion that Section 626.988 Is Not the Kind of Law Contemplated by Section 2(b).

It is wholly undisputed that the McCarran-Ferguson Act was Congress' response to this Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). *See St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 538 (1978). On June 5, 1944, in the *South-Eastern Underwriters* decision, this Court held by a 4-to-3 vote (Justices Roberts and Reed not participating), that the "modern insurance business" (322 U.S. at 539) is "Commerce among the several States" within the reach of Congress' power under the Interstate Commerce Clause of the United States Constitution, so as to be subject to the federal antitrust laws. In so doing, the Court majority repudiated its oft-quoted pronouncement that "[t]he business of insurance is not commerce." *Hooper v. California*, 155 U.S. 648, 654-55 (1895). *See also Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183 (1869) ("issuing a policy of insurance is not a transaction of commerce").

Three respected Justices of this Court dissented in the *South-Eastern Underwriters* case — Chief Justice Stone and Justices Frankfurter and Jackson. In addition to arguing that Congress did not intend, when it enacted the Sherman Act in 1890, to have it reach the "business of insurance," Chief Justice Stone contended that "the business of writing insurance" — *i.e.*, the issuance of *contracts* of insurance — was not interstate commerce in the constitutional sense. 322 U.S. at 571. He concluded his dissent with dire predictions of the consequences of the majority's decision on existing state regulation of the insurance business. He said that the "immediate and only practical effect of the decision now rendered is to withdraw from the states, in large measure, the regulation of insurance and to confer it on the national government, which has adopted no legislative policy and evolved no scheme of regulation with respect to the business of insurance." 322 U.S. at 580-581.

Justice Frankfurter's brief dissent echoed the then-Chief Justice's view that the Court's ruling would result in "far-reaching dislocations" between federal and state power. 322 U.S. at 584. And Justice Jackson's dissent rested on the premise that the Court's early decisions concerning the regulation of insurance required it to determine "either that insurance was subject to state regulation or that it was subject to no existing regulation at all." 322 U.S. at 585. Justice Jackson said that "[t]he orderly way to nationalize insurance supervision, if it be desirable, is not by court decision but through legislation." *Id.* at 593. He noted, however, that "we have not a hint from Congress that it concurs in the plan to federalize responsibility for insurance supervision." *Id.* at 591.

Confronted with these prophecies that the robust *corpus* of state regulation and taxation of the insurance business would be supplanted by a skeleton of federal statutes, Congress sought to undo the damage. Senators McCarran and Ferguson co-sponsored legislation designed "to express the intent of the Congress with reference to the regulation of the business of insurance." 91 Cong. Rec. 478 (1945). The first section of the McCarran-Ferguson bill was, like the current 15 U.S.C. § 1011, a declaration of purpose:

> Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, that the Congress hereby declares that the continued

regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Prior to the introduction of the McCarran-Ferguson bill there had been substantial discussion in both the House and Senate as to what power remained with the States to regulate insurance after the *South-Eastern Underwriters* decision. Proponents of legislation expressed the fear that "every state statute, court decision, and departmental ruling relating to the taxation of insurance became immediately questionable." Weller, *The McCarran-Ferguson Act's Antitrust Exemption for Insurance: Language, History and Policy*, 1978 Duke L.J. 587, 590 (1978) (quoting from Sawyer, Insurance as Interstate Commerce 50-51 (1945)). Illustrative of the kind of concern that led to the enactment of Section 2(b) was the statement by Senator Radcliffe of Maryland, who conveyed President Roosevelt's approval of the bill (91 Cong. Rec. 481 (1945)), and went on to say (*id.* at 482):

> The insurance commissioners and many of the insurance companies have been in great doubt as to how they could operate at this time with respect to matters of collection of premiums, general regulations, the issuing of licenses, and many other aspects of the business. Therefore it seems very desirable that somewhere in this measure there should be a statement that the rights of the States to regulate and to collect taxes should not be repealed by implication.

It is plain from all the debate prior to the passage of the initial versions of the McCarran-Ferguson Act by the Senate in January 1945 and by the House in February 1945 that Congress was concerned about entire regulatory schemes that were in place in most States. This same concern emerges from the debate that followed issuance of the Conference Report in late February 1945. Senators wished to be sure that the new law would maintain in place the *existing systems of insurance regulation by the States*. Senator McCarran read the following statement from the House Judiciary Committee report (91 Cong. Rec. 1442 (1945), quoting from H.R. Rep. No. 213, 79th Cong., 1st Sess. (1945) (emphasis added)):

> It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the Supreme Court in the Southeastern Underwriters Association case. Briefly, your committee is of the opinion that we should provide for *the continued regulation and taxation of insurance by the States*, subject, always, however, to the limitations set out in the controlling decisions of the United States Supreme Court . . . .

The uncertain validity of state regulation of insurance was again emphasized by Senator Radcliffe's statement on the day the Senate finally passed the Conference Committee's version, which is substantially the existing law (91 Cong. Rec. 1488 (1945)):

> If we do not enact any legislation at this time, the situation will be a very serious one. The

> State insurance commissioners do not know what to do. For instance, they do not know whether they can collect taxes or issue permits. The insurance companies do not know whether they can pay taxes. The insurance commissioners do not know whether they can issue regulations. The entire operation of the insurance business is now in more or less a chaotic condition due to uncertainties which require immediate legislative action. We must have some legislation at the earliest possible moment.

The message of this legislative history is clear. Congress did not pass the McCarran-Ferguson Act — and particularly Section 2(b) of that Act — to authorize States in the future to adopt new barriers, for reasons having nothing to do with the integrity or efficiency of the insurance business, to qualified persons or concerns wishing to enter the insurance agency business or to assess novel fines, fees or penalties on particular enterprises or individuals engaged in that business. Congress was concerned with the regulatory structure for the insurance business that a State had created or might create in the future.

Fidelity to that legislative history and to the paramount manifested purpose of Congress requires that Section 626.988 be invalidated. It is simply not a law enacted "for the purpose of regulating the business of insurance" within the contemplation of Section 2(b).

C. Under This Court's Decisions Construing Section 2(b), the Florida Statute Is Not a Law "Regulating the Business of Insurance."

This Court's decisions construing Section 2(b) of the McCarran-Ferguson Act confirm the limited role the Act was intended to play in securing against federal displacement only state legislation that genuinely regulates the business of insurance. Under those decisions, Section 626.988 manifestly does not qualify as a state law "regulating the business of insurance."

(1) <u>*SEC v. National Securities*</u>

In this Court's first decision construing the statutory language at issue here, *SEC v. National Securities, Inc.*, 393 U.S. 453 (1969), the Court emphasized that the McCarran-Ferguson Act must be construed in light of its genesis in the controversy that erupted in the wake of *South-Eastern Underwriters*. The Court explained (*id.* at 459-60):

> Given [the Act's] history, the language of the statute takes on a different coloration. The statute did not purport to make the States supreme in regulating all the activities of insurance *companies*; its language refers not to the persons or companies who are subject to state regulation, but to laws "regulating the *business* of insurance." Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the "business of insurance" does the statute apply.

The Court held that the "core" of the "business of insurance" requirement of Section 2(b) was "[t]he

relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement." 393 U.S. at 460 (quoted in *United States Dep't of Treasury v. Fabe*, 113 S. Ct. 2202, 2208 (1993)). Thus, a law must do more than simply affect the insurance industry to "regulate the business of insurance" within the meaning of the McCarran-Ferguson Act. It must be directed toward the rights and obligations that arise from the contract between insurer and insured. As a result, the Court held in the *National Securities* case that an Arizona law protecting insurance company stockholders from unfair or unlawful mergers was not enacted to regulate the business of insurance (393 U.S. at 457), but a statute designed explicitly to preserve "the security and service to be rendered policyholders" did regulate the insurance business (393 U.S. at 462).

Here, Section 626.988 plainly does not concern the relationship between insurer and insured, the type of insurance policy that is issued, the rights and obligations of the parties to the insurance contract, or the interpretation and enforcement of such a policy. Hence it is not at the "core" of the statutory phrase as construed in *National Securities*.

(2) *United States Dep't of Treasury v. Fabe*

The only other case in which this Court has directly construed the language of Section 2(b) that may be dispositive here, *United States Dep't of Treasury v. Fabe*, 113 S. Ct. 2202 (1993), confirms the limited scope of McCarran-Ferguson's protection of state law, and its inapplicability to Section 626.988.

In *Fabe*, the Court considered whether an Ohio law regulating insurance companies, which conflicted with federal bankruptcy law by assigning the United States a

lower priority than other creditors in an insurance company liquidation proceeding, was a law enacted "for the purpose of regulating the business of insurance." 113 S.Ct. at 2208. After a detailed review of each creditor priority prescribed by the statute, the Court majority concluded that only provisions that directly regulated the insurer-policyholder relationship by providing a preference for the payment of policyholder claims were shielded from pre-emption by the McCarran-Ferguson Act. This conclusion rested on the majority's determination that by directly facilitating the payment of claims to policyholders, the law was "integrally related to the performance of the insurance contract." 113 S. Ct. at 2209. The four dissenters would have read McCarran-Ferguson even more narrowly, holding that even the priority for policyholder claims was pre-empted.

Significantly, the Court unanimously agreed that the priority given by the Ohio law to claims of non-policyholders, such as employees and general creditors, did not further the interests of policyholders so directly as to constitute regulation of the insurance business. While conceding that "every preference accorded to the creditors of an insolvent insurer may redound to the benefit of policyholders by enhancing the reliability of the insurance company," *id.* at 2212, the Court majority held that such indirect benefits to insurers or their policyholders do not suffice to avoid pre-emption under the McCarran-Ferguson Act.

(3) *Royal Drug* and *Pireno*

Two other decisions of this Court that concern related statutory language — *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979), and *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982) — confirm the limits on the scope of the protection afforded by the McCarran-

Ferguson Act to state laws regulating the business of insurance. Both decisions involved the proviso to Section 2(b) of the Act, which exempts those engaged in the regulated business of insurance from the federal antitrust laws. This Court's more recent decision in *Fabe*, while noting the distinction between the statutory phrases "law[s] enacted . . . for the purpose of regulating the business of insurance" in Section 2(b) and "the business of insurance" as used in the proviso, holds that the principles of *Royal Drug* and *Pireno* help to define the scope of Section 2(b)'s protection of laws regulating the business of insurance. *See Fabe*, *supra*, 113 S. Ct. at 2209-10, 2212.

In the *Royal Drug* case, the Court considered whether agreements between Blue Shield and certain pharmacies to set the cost of prescription drugs sold to Blue Shield policyholders were part of the "business of insurance" exempted from the antitrust laws by the McCarran-Ferguson Act. Noting that the McCarran-Ferguson Act exempts the "business of insurance" and not the "business of insurers" (440 U.S. at 205), the Court identified three criteria relevant to defining the "business of insurance" (*Pireno*, *supra*, 458 U.S. at 129):

> *first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry.

Applying these factors, the majority in *Royal Drug* rejected Blue Shield's contention that the potential benefits that flowed indirectly from the pharmacy agreements to Blue Shield policyholders sufficed to bring the agreements within

the "business of insurance" exemption. 440 U.S. at 216-17. The Court held that the pharmacy agreements met none of the three criteria that define the "business of insurance."

Similarly, in the *Pireno* case, the Court applied the *Royal Drug* criteria to conclude that the use of a "peer review committee" to advise insurance companies whether some chiropractic treatments and fees were "reasonable" and "necessary" was not part of the "business of insurance." *See also Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 48-49 (1987) (applying the *Royal Drug* criteria to determine the scope of the pre-emption savings clause in the Employee Retirement Income Security Act).

(4) The Governing Principle

The legal principle that emerges from these decisions is that a law "enacted . . . for the purpose of regulating the business of insurance" must be directed toward the rights and obligations that arise from the contractual relationship between insurance companies and their policyholders. Legislation that results only in incidental, remote or unintended benefits to policyholders does not qualify for protection under the McCarran-Ferguson Act. This Court has declared that "'[a]ncillary activities' that do not affect performance of the contract or enforcement of contractual obligations do not enjoy the anti-trust exemption for laws regulating the 'business of insurance.'" *Fabe*, *supra*, 113 S. Ct. at 2209 (quoting *Pireno*, *supra*, 458 U.S. at 134 n. 8). Likewise, state laws that do not affect the performance or enforcement of the insurance contract or whose "connection to the ultimate aim of insurance is too tenuous" do not "escape pre-emption" by virtue of the McCarran-Ferguson Act. *Fabe*, *supra*, 113 S.Ct. at 2212.

(5) Application to Section 626.988

The Florida law at issue here plainly does not "center around the contract of insurance" or regulate "the relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement" — the subjects this Court has held to be "the core of the 'business of insurance.'" *National Securities*, *supra*, 393 U.S. at 460. Nor does Florida's prohibition on banks acting as insurance agents "protect policyholders" by regulating "the performance of an insurance contract." *Fabe*, *supra*, 113 S.Ct. at 2210. Rather, Section 626.988 operates to define the powers of "financial institutions," including national banks and bank holding companies, by restraining these entities from engaging in activities that have long been associated with the business of banking.[3] *See* Fla. Stat. Ann. § 626.988 (1)(a). That purpose is far beyond the range defined by this Court's decisions and it follows, therefore, that the Florida law does not qualify under Section 2(b).

[3] State-chartered banks have provided their customers with access to insurance for almost two centuries. *See* Bray Hammond, *Banks and Politics in America From the Revolution to the Civil War*, 154, 194-95 (1957). In 1916, Congress authorized national banks in small towns to offer this service to their customers. *See* 12 U.S.C. § 92. Insurance sales since that time, like other financial services that banks may offer, have grown to form a significant aspect of the business of banking.

III.

SECTION 92 "SPECIFICALLY RELATES TO THE BUSINESS OF INSURANCE"

The McCarran-Ferguson Act shields a state insurance law from pre-emption only if it is not inconsistent with a federal law that "specifically relates to the business of insurance." 15 U.S.C. § 1012(b). Even if, contrary to our argument on pp. 17-40, *supra*, this Court were to conclude that Section 626.988 was enacted "for the purpose of regulating the business of insurance," the Florida law must still clear a second hurdle before it can be applied. In this case, that second hurdle becomes virtually insurmountable if the Florida law clears the first. For if a *prohibition* on banks selling insurance *regulates* the "business of insurance," Section 92's *express authorization* of bank insurance sales must at least *specifically relate* to the insurance business under the plain meaning of Section 2(b) of the McCarran-Ferguson Act.

A. The Specific Subject Matter of Section 92 Is Bank Sales of Insurance.

We begin once again with consideration of the language of Section 2(b) and its application to the relevant statute. In construing the extent to which Section 92 retains its pre-emptive effect over conflicting state regulation it is important to bear in mind this Court's instruction that whenever possible, it is appropriate to take "what guidance [is] available from a 'common-sense view' of the language of the [statute] itself." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 48 (1987). Given the breadth and clarity of the language of Section 92, common sense is all that is required to determine that it "specifically relates to the business of insurance."

Section 92 grants to a defined class of national banking associations the power to "act as the agent for any fire, life, or other insurance company . . . ." As the Seventh Circuit recently put it, the statute "identifies a line of business in which national banks may engage." *NBD Bank, N.A. v. Bennett*, No. 95-1310, 1995 U.S. App. LEXIS 27835 at *4. Quite obviously, the statute "specifically relates" to the line of business it authorizes national banks to engage in. If, as the respondents contend, that line of business is part of "the business of insurance," Section 92 necessarily "specifically relates to the business of insurance."

Given the plain meaning of Section 92, the Court need spend no more time on this issue than it spent determining whether the Employee Retirement Income Security Act of 1974 ("ERISA") "specifically relates to the business of insurance" in *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517 (1993). In *Hancock*, the Court held simply that: "ERISA, both in general and in the guaranteed benefit policy provision in particular, *obviously and specifically relates to the business of insurance.*" 114 S. Ct. at 525 (emphasis added) (*quoting* Brief for the United States as *Amicus Curiae* 23, n. 13). The same is true here.

B. The McCarran-Ferguson Act Uses Broad Language in Preserving Federal Legislation that "Specifically Relates" to Insurance.

The Court can avoid giving pre-emptive effect to Section 92 only by reaching the anomalous conclusion that a federal statute which grants certain banks the power to sell insurance does not "specifically relate" to the business of insurance. Such a conclusion would directly conflict with this Court's prior interpretations of the term "relates."

The Court has repeatedly emphasized the expansive meaning of the term "relates" or "relating." In *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), the Court considered the breadth of the pre-emption provision in the Airline Deregulation Act of 1978, which pre-empts "any law . . . *relating to* rates, routes, or services of any air carrier." 49 U.S.C. § 1305(a)(1) (emphasis added). The Court described the "relating to" clause as having a "broad scope," and an "expansive sweep," and as being "conspicuous for its breadth." Accordingly, it held that "to relate" meant "to stand in some relation, to have bearing or concern; to pertain; refer; to bring into association with or connection with." 504 U.S. at 383-84 (quoting Black's Law Dictionary 1158 (5th ed. 1979)).[4]

In *Smith v. United States*, 113 S. Ct. 2050 (1993), which involved a law imposing enhanced penalties on a defendant who "*in relation to* . . .[a] drug trafficking crime . . . uses . . . a firearm" (emphasis added), the Court also said that "the phrase 'in relation to' is expansive." 113 S. Ct. at 2058. A broad construction was applied in *Smith* despite the time-honored rule that criminal statutes are to be narrowly construed in favor of the defendant. *E.g.*, *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 285 (1978).

Section 92 clearly "relates" to the business of insurance in the broad sense used in this Court's opinions.

[4] The Court has construed ERISA's pre-emption of laws that "relate to" employment benefit plans similarly broadly. *See, e.g.*, *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 128 (1992) (citing cases). In *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671, 1677 (1995), the Court observed that this language clearly covered laws that expressly refer to employee benefit plans (as Section 92 expressly refers to insurance).

When the statute authorizes national banks to engage in that business, the law both refers to the business of insurance and pertains to it. This comports with the definition of the word "relates" in *Webster's New International Dictionary of the English Language*, cited and quoted in the *Smith* opinion, *supra*, 113 S. Ct. at 2059, and in *Black's Law Dictionary*, cited in *Morales*. Moreover, the reference and pertinence to insurance is surely "specific," as the statute expressly addresses insurance sales and describes with particularity the permitted scope of such activities.

C. The Eleventh Circuit's Holding Distorts the Statutory Language.

The court of appeals held that Section 92 did not override Section 626.988 because (1) Section 92 was not intended by Congress to "regulate" insurance and (2) Section 92 did not "specifically require" that a conflicting state law be invalidated. 43 F.3d at 637, Pet. App. 15a. Neither of these reasons justifies the Eleventh Circuit's result.

(1) Specific Rejection of State Law Is Not Required.

The court of appeals has, with its second justification, added a condition to Section 2(b) that the law does not prescribe — *i.e.*, that a federal statute specifically declare that it overrides a contrary state law. Such a statutory requirement initially passed the House and the Senate when the McCarran-Ferguson Act was being debated. Section 2(b) of the bills that went to the Conference Committee provided:

> No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, *unless such act specifically so provides*.

91 Cong. Rec. 329-30 (1945); 91 Cong. Rec. 478-88 (1945) (emphasis added).

The Conference Committee, however, jettisoned the narrow savings clause in favor of an expansive clause that validates any federal statute that "specifically relates to the business of insurance." 91 Cong. Rec. 1935-36 (1945). By making this change, the Conference Committee and the Congress made clear that the savings clause should apply to federal statutes that specifically relate to insurance, whether or not they explicitly declare that they are intended to have pre-emptive effect.

(2) The Federal Law "Relates" to Insurance Regardless of Whether It "Regulates" Insurance.

The other reason stated by the court below — that Section 92 could not "regulate" the business of insurance because it was passed at a time when Congress believed it lacked such regulatory authority under the Commerce Clause — is simply a *non sequitur*. The McCarran-Ferguson Act recognizes the validity not only of federal statutes that "regulate" the business of insurance, but of all federal statutes that "specifically relate" to that business. Even if Congress believed in 1916 that it lacked power under the Commerce Clause to enact comprehensive "regulation" of the business of insurance, it was not disabled from passing a law that "related" to that business if, as was true of Section 92, it came, as did other national banking legislation, within the Necessary and Proper Clause. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *cf. Norman v. Baltimore & O.R. Co.*, 294 U.S. 240, 303 (1935). The

Eleventh Circuit may be accurate in stating that the 1916 Congress was "concerned with banking" when it passed Section 92. But the law nonetheless *relates* to insurance.

The Eleventh Circuit's reasoning would mean that *no* federal law enacted before *South-Eastern Underwriters* could be validated as a law that "specifically relates to the business of insurance." Such an interpretation of the McCarran-Ferguson Act is contrary not only to its plain language, but also to the clearly expressed views of its sponsors. Senator Ferguson, one of the Act's principal architects, stated expressly that the savings clause was intended to confirm federal statutes then on the books, provided that they were specifically related to the business of insurance. During the debate on the Senate bill, Senator Murdock asked Senator Ferguson whether Section 2(b) applied to federal statutes then in existence as well as to those that might be passed in the future. 91 Cong. Rec. 479 (1945). Senator Ferguson replied that it applies to *all* statutes "specifically relating to insurance." *Id.*

This is how the savings clause has been interpreted by a number of other courts of appeals. In *Texas Employers' Ins. Ass'n v. Jackson*, 820 F.2d 1406, 1414-15 (5th Cir. 1987), *rev'd on rehearing on other grounds*, 862 F.2d 491, *cert. denied*, 490 U.S. 1035 (1988), the court held that the Longshoremen and Harbor Workers Compensation Act, including the penalty provisions in Section 14 (33 U.S.C. § 914) that were passed in 1927, "specifically relates to the business of insurance." Likewise, Section 832(c) of the Internal Revenue Code, which defines "insurance company income," and originally appeared in the Revenue Act of 1942, was found to pass the "specifically relates" test in *Hanover Ins. Co. v. Commissioner*, 598 F.2d 1211 (1st Cir.), *cert. denied*, 444 U.S. 915 (1979). Finally, the National Service Life Insurance Act of 1940, Ch. 757, §

601, 54 Stat. 1008 (repealed 1958), which was passed well before 1945, dealt solely with the business of insurance. This Court had no trouble finding the Act constitutional (*Wissner v. Wissner*, 338 U.S. 655 (1950)), and its provisions would unquestionably be found to relate specifically to the business of insurance if tested under the McCarran-Ferguson Act.

For all these reasons, the Court should reach the conclusion dictated by the plain language of the McCarran-Ferguson Act and by Section 92 and by common sense — that *even if* Florida's *prohibition* on bank sales of insurance is a regulation of the "business of insurance," it necessarily follows that Section 92's *express authorization* of such sales "specifically relates to the business of insurance."

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Court of Appeals and remand the case for entry of final declaratory and injunctive relief in favor of Barnett Bank on the question whether 12 U.S.C. § 92 pre-empts Fla. Stat. Ann. § 626.988.

Respectfully submitted,

NATHAN LEWIN
(Counsel of Record)
SCOTT L. NELSON
J. BRADLEY BENNETT
JAMES R. HEAVNER, JR.
MILLER, CASSIDY,
LARROCA & LEWIN
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

RICHARD E. SWARTLEY
General Counsel
BARNETT BANKS, INC.
50 N. Laura Street
Jacksonville, FL 32202
(904) 791-7505

November 1995

Attorneys for Petitioner

APPENDICES

APPENDIX A
(CONSTITUTIONAL AND STATUTORY PROVISIONS)

1. The Supremacy Clause of the United States Constitution (art. VI, cl. 2) provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .

2. 12 U.S.C. § 92, 39 Stat. 753 (1916), provides:

> In addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees or commissions as may be agreed upon between the said association and the insurance company for which it may act as agent: *Provided*,

however, That no such bank shall in any case assume or guarantee the payment of any premium on insurance policies issued through its agency by its principal: *And provided further,* That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance.

3. The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1012, 59 Stat. 34 (1945), provides in pertinent part:

§ 1011. Declaration of policy

Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

§ 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) State regulation

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal Regulation

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

4. Florida Statutes Annotated § 626.988 provides in pertinent part:

626.988. Financial institutions; agents and solicitors prohibited from employment; exceptions

(1) For the purpose of this section, the following definitions shall apply:

(a) "Financial institution" means any bank, bank holding company, savings and loan association, savings and loan association holding company, or savings and loan association service corporation or any subsidiary, affiliate, or foundation of any of the foregoing. This definition shall not,

however include any financial institution which has been granted an exemption by the Board of Governors of the Federal Reserve System pursuant to s. 4(d) of the federal Bank Holding Company Act of 1956, as amended,[] or any financial institution which neither owns more than 10 percent of the capital stock, nor exercises effective control, of a bank, savings and loan association, or entity licensed under chapter 494 and licensed or authorized to transact business in this state. Specifically excluded from this definition is any bank which is not a subsidiary or affiliate of a bank holding company and is located in a city having a population of less than 5,000 according to the last preceding census.

(b) "Insurance agency activities" means the procurement of applications for, or the solicitation, negotiation, selling, effectuating, or servicing of, any policy or contract of insurance other than credit life insurance and credit disability insurance.

* * *

(2) No insurance agent or solicitor licensed by the Department of Insurance under the provisions of this chapter who is associated with, under contract with, retained by, owned or controlled by, to any degree, directly or indirectly, or employed by, a financial institution shall engage in insurance agency activities as an employee, officer, director, agent, or associate of a financial institution agency.

APPENDIX B
(COMMITTEE SUBSTITUTE FOR H.B. 3152
3RD FLA. LEG., 2D SESS. (1974))

A bill to be entitled

An act relating to insurance; creating §626.988, Florida Statutes; prohibiting insurance agents and solicitors associated with certain financial institutions from soliciting, negotiating, selling, effectuating or servicing any policy of insurance; providing exceptions with respect to certain types of insurance and certain agents and solicitors so engaged on April 2, 1974; providing an effective date.

WHEREAS, there is now pending before the Board of Governors of the Federal Reserve System various applications by bank holding companies to engage in the insurance agency business, and

WHEREAS, an administrative law judge has prepared a recommended decision for consideration by the Federal Reserve Board which enumerates the anticipated adverse effects on the public of the entry of bank holding companies into insurance agency activities, but recommends that the applicants to be authorized to engage in such activities in a limited manner and subject to various restrictions, and

WHEREAS, after hearing an exhaustive presentation of evidence, the administrative law judge reached various conclusions concerning the bank holding company applicants, among them are the following:

a) " . . . [T]he entry of large banking institutions into the insurance agency business in areas where the banks have a large concentration of resources would result in the demise of small insurance agencies or their transformation into large combinations. This would decrease competition within the insurance industry and reduce the opportunity for youths, veterans and women to gain a foothold in a business in which ultimately they could participate as owners or managers."

b) " . . . [W]hile there is a minor convenience in bank affiliated insurance agency sales in the case of personal lines such as automobile and homeowner's coverages, the convenience advantage in the case of commercial financing - insurance appears insignificant."

c) " . . . [I]t appears that the gains in efficiency [by] the bank affiliated insurance agencies will largely benefit the applicants in terms of larger-scale operating economies," and "Based upon their record of maximum charges for credit life insurance it is not reasonable to expect that the applicants will voluntarily lower premiums in other fields of insurance."

d) " . . . [W]hile it is difficult to accurately measure the psychology of voluntary tieing, nevertheless the weight of evidence realistically evaluated suggests that in times of scarcity of lending funds, the average borrower finds himself in a weakened bargaining position vis-a-vis the lender and

the offer of insurance placement is another device along with compensating balances and utilization of other banking services with which the borrower can increase the probability that a needed loan will be granted."

(e) " . . . [S]ince banks are predominantly the depositaries of 'other peoples' money, 'therefore they should not be in competition with their depositors."

and,

WHEREAS, the undue concentration of economic resources, a substantial decrease in competition among insurance agents, unfair competition, conflicts of interest and voluntary tieing are against the public policy of the state and against the best interests of the people of Florida, and

WHEREAS, other financial institutions which enter insurance agency activities will cause the same results as the entry of bank holding companies into such activities, and

WHEREAS, the United States Congress by the Federal Bank Holding Act of 1956, 12 USCA §1846, specifically reserved to the states the power and authority to enact legislation with respect to bank holding companies, and

WHEREAS, to preserve the public policy and protect the public interest insurance agents and solicitors should be prohibited from soliciting, negotiating and selling insurance contracts if employed by, associated or affiliated in any way with specified institutions, NOW, THEREFORE,

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 626.988, Florida Statutes, is created to read:

626.988 Financial institutions; agents and solicitors prohibited from employment; exceptions.--

(1) For the purpose of this section the following definitions shall apply:

(a) "Financial institution" means any bank, bank holding company, savings and loan association, savings and loan association holding company, savings and loan association service corporation, and any subsidiary, affiliate, employees' trust or foundation of any of the foregoing. This definition shall not, however, include any financial institution which has been granted an exemption by the Board of Governors of the Federal Reserve System pursuant to Section 4(d) of the Federal Bank Holding Company Act of 1956, as amended, or any financial institution which neither owns more than ten percent (10%) of the capital stock nor exercises effective control of a bank, savings and loan association or entity licensed under chapter 494, Florida Statutes, which is licensed or authorized to transact business in Florida. Specifically excluded from this definition is any bank which is not a subsidiary or affiliate of a bank holding company and is located in a city having a population of less than five thousand (5,000) according to the last preceding census.

(b) "Insurance agency activities" means the procurement of applications, solicitation, negotiation, selling, effectuating or servicing of any policy or contract of

insurance other than credit life insurance and credit disability insurance.

(c) "Financial institution agency" means any person, firm, partnership or corporate entity which is engaged in insurance agency activities, as herein defined, and is associated with, owned, controlled, employed or retained by a financial institution as herein defined.

(2) No insurance agent or solicitor licensed by the department of insurance under the provisions of chapter 626, Florida Statutes, who is associated with, under contract with, retained by, or owned or controlled to any degree directly, or indirectly, or who is employed by a financial institution shall engage in insurance agency activities as an employee, officer, director, agent or associate of a financial institution agency.

(3) The department of insurance shall not grant, renew, continue or permit to exist any license as such agent or solicitor as to any applicant therefor or licensee thereunder if it finds that the license has been or is being or will probably be used by the applicant or licensee for any purpose prohibited by this section.

(4) Notwithstanding any provision of this section the department of insurance shall permit the continued operation under the same ownership and control of all financial institution agencies which were in existence and engaged in insurance agency activities as of April 2, 1974. To make possible such continuation the department of insurance may license agents and solicitors who are otherwise qualified, as successors to those agents and solicitors who are exempt from the provisions of this section, and their successors, for so long as the specific financial institution agency continues to function as it was constituted

on April 2, 1974; provided, however, that no agent or solicitor so licensed under this section shall be permitted to be employed, or controlled to any degree, directly or indirectly, by any financial institution agency except the particular agency for which he was so licensed as a successor for the purposes of this section.

(5) This section shall not prevent an agent or solicitor from serving as an officer or director of a financial institution, provided that he conducts all of his insurance activities free of ownership or control of the financial institution, and, provided further that the financial institution does not participate directly or indirectly in the earnings from his insurance activities.

(6) This section shall not apply to agents or solicitors who were engaged as of April 2, 1974, in activities prohibited by this section and who have been continuously so engaged since that date, but only with respect to the specific type of license held and the financial institution with which the agent or solicitor was associated on said date.

Section 2. This act shall take effect upon becoming a law.